THE PROSECUTOR'S MANUAL
Chapter 16
INSANITY

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Presentation on
"INSANITY DEFENSE"
by
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An experienced mental health witness will be able to find some authority and factual basis for virtually any diagnosis made. A psychiatrist or psychologist with extensive forensic experience will often be quite skilled at fielding inquiries regarding different mental illnesses.

However, certain fields can be developed in almost any case in which an attorney is confronted with the testimony of a mental health expert. These areas include the generally conceded inexactness of psychiatry and psychology, the facts peculiar to the particular case that have a bearing on the issue of sanity, and the commonplace willingness of some mental health experts to go into court and testify on the issue of sanity armed with virtually nothing more than a relatively brief interview of the defendant and whatever conclusions they choose to draw therefrom.

Opinions and views expressed herein are those of the author.

I. Competence to Stand Trial and to Plead Guilty

A. Incompetence Distinguished from Insanity

The terms "incompetence" and "insanity" are not synonymous. Competence of a defendant to stand trial is generally said to involve the issues of whether the defendant is able to understand the proceedings against him and the ability of the defendant to assist in his own defense. *See, e.g., Dusky v. United States*, 362 U.S. 402 (1960). Generally, when an insanity defense is likely to be presented at trial, it is necessary to have a determination as to the defendant's competence prior to the commencement of trial.

B. Necessity for Competency Hearing

The Supreme Court has held that hearings regarding competence to stand trial are constitutionally mandated when doubt as to competence exists. *See, e.g., Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). A defendant may be found competent despite the conclusions of examining mental health experts to the contrary, if other evidence supports the finding. *See,e.g., Williams v. State*, 396 So. 2d 267, 269 (Fla. 1981); *Howard v. State*, 355 N.E.2d 833, 835 (Ind. 1976). The Arizona Supreme Court has stated determination of competence to stand trial is always and exclusively a question for the court. *Bishop v. Superior Court*, 150 Ariz. 404, 407, 724 P.2d 23, 26 (1986); Rule 11.5, Ariz. R. Crim. P. Although experts may be of assistance, the judge is not bound by their opinions and the determination of both fact and law is his. *Id*.; Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 470 (1967).

C. Competence to Stand Trial Distinguished from Competence to Plead Guilty

Some courts, most notably the Ninth Circuit and District of Columbia appellate courts, have recognized a different test for competence to plead guilty than that used to determine competence to stand trial. *See, e.g., Chavez v. United States*, 656 F.2d 512, 518-19 (9th Cir. 1981). Thus, in *Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973), the Ninth Circuit Court of Appeals defined competence to plead guilty as follows:

> A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea.

478 F.2d at 2151, quoting *Schoeller v. Dunbar*, 423 F.2d 1183, 1194 (9th Cir. 1970). However, most courts have declined to distinguish between competence to stand trial and competence to plead guilty. These courts adopt the *Dusky* standard for both competence to stand trial and competence to plead guilty, holding that a defendant is competent to stand trial and competent to plead guilty if he had sufficient present ability to consult with his lawyer with a reasonable degree of rational and factual understanding of the proceedings against him. *Allard v. Helgemoe*, 572 F.2d 1, 3-4 (1st Cir. 1978); *United States ex rel. McGough v. Hewitt*, 528 F.2d 339, 342 n.2 (3d Cir. 1975); *Bolius v. Wainwright*, 597 F.2d 986, 988, n.3 (5th Cir. 1979); *Williams v. Bordenkircher*, 696 F.2d 464, 466 (6th Cir. 1983); *United States v. Franzen*, 667 F.2d 633, 638 (7th Cir. 1981); *White Hawk v. Salem*, 693 F.2d 825, 829-30, n.7 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983); *Wolf v. United States*, 430 F.2d 443, 444 (10th Cir. 1970); *Stinson v. WTI RV/Tight*, 710 F.2d 743, 745 (11th Cir. 1983).

II. Insanity

A. Insanity Defined

1. M'Naghten Rule

A.R.S. § 13-502 sets forth the test for finding a defendant guilty except insane.

> A defendant may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.

A.R.S. § 13-502(A). This standard is a form of the M'Naghten rule. The term "insanity" refers to the legal standard of accountability for the crime itself. More than half the states and all federal courts have some form of the so-called M'Naghten Rule, which provides that a defendant was insane at the time of commission of the crime if, as a result of mental disease or defect, he was unable to appreciate the nature and quality of his acts, or was unable to know the difference between right and wrong insofar as his acts were concerned.

Arizona's form of the M'Naghten rule eliminates the part of the test asking whether the mental disease or defect leaves the defendant unable to understand what he is doing, a modification the United States Supreme Court has upheld. *Clark v. Arizona*, 548 U.S. 735, 771, 1126 S.Ct. 2709, 2732 (2006).

2. Mental Disease or Defect Defined

a. What Constitutes a Mental Disease or Defect

The mere fact that a defendant has a mental disease or defect is insufficient to support an insanity defense. In fact, evidence of a mental disorder short of insanity is inadmissible either as an affirmative defense or to negate the mental state of the crime. *State v. Mott*, 187 Ariz. 536, 541, 931, P.2d 1046, 1051 (1997).

The defendant must also prove that the defect was so severe that the defendant did not know right from wrong. *See In re Natalie Z.*, 214 Ariz. 452, 456, 153 P.3d 1081, 1085 (App. Div. 2 2007). "Wrong" for purposes of the insanity defense, is defined by generally accepted community standards of morality. *State v. Corley*, 108 Ariz. 240, 243, 495 P.2d 470, 473 (1972). A defendant's subjective belief is not relevant. *State v. Tamplin*, 195 Ariz. 246, 247, 986 P.2d 914, 915 (App. Div. 2 1999).

Even if the defendant has a mental disease or defect that fits the statutory definition, the defendant may still be held responsible for criminal conduct committed during a lucid interval. *Todd v. Melcher*, 11 Ariz. App. 157, 160, 462 P.2d 850, 853 (App. Div. 1 1969).

b. Exceptions

The insanity statute exempts disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders, and temporary conditions arising from "the pressure of the circumstances, moral depravity or passion growing out of anger, jealousy, revenge, hatred or other motives...." A.R.S. § 13-502(A).

B. Burden of Proof

The burden of proof as to establishing or disproving insanity varies from one jurisdiction to another. For example, in some jurisdictions the defendant must establish the defense of insanity by meeting a specified burden of proof. *See, e.g.*, 18 U.S.C. § 20(b).

In Arizona, insanity is an affirmative defense which the defendant is required to prove by clear and convincing evidence. A.R.S. § 13-502(B). When describing the burden of proof to the jury, the clear and convincing evidence standard should be defined as "highly probable." *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988).

Recognizing insanity as an affirmative defense does not negate the state's burden of proof. *State v. Hurles*, 185 Ariz. 199, 203, 914 P.2d 1291, 1295 (1996). The state must still prove every element of the charged offense beyond a reasonable doubt. *Id*.

C. DSM-IV: Panoply of Disorders

The Diagnostic and Statistical Manual IV (DSM-IV) contains all recognized mental disorders. The Psychiatric Glossary is an important companion publication to the DSM-IV. The DSM-IV contains over 230 different disorders. Many disorders have been added to the DSM-IV which had not been recognized in either DSM-I (1952), DSM-II (1968), or DSM-III (1981). The

marked increase in the number of mental disorders recognized by the American Psychiatric Association (APA) in DSM-IV has produced a situation in which novel or innovative disorders are sometimes the basis for an insanity defense.

1. Pathological Gambling

In *United States v. Gillis*, 645 F.2d 1269, 1278 (8th Cir. 1981), the district court permitted the pathological gambler disorder to be submitted to the jury as the basis for an insanity defense to a kidnapping charge. But see, *United States v. Llewellyn*, 723 F.2d 615 (8th Cir. 1983); *United States v. Gould*, 741 F.2d 45 (4th Cir. 1984).

2. Post-traumatic Stress Disorder (PTSD)

In *United States v. Crosby*, 713 F.2d 1066, 1076-77 (5th Cir. 1983), post-traumatic stress disorder was utilized by a Vietnam veteran as the basis for an insanity defense in a prosecution for kidnapping. The Fifth Circuit stated that since PTSD is a medical diagnosis, only an expert can testify that a defendant suffered from the disorder.

In *United States v. Toner*, 728 F.2d 115, 122-123 (2nd Cir. 1984), a member of the Provisional Irish Republican Army charged with arms violations attempted to utilize this defense based upon prolonged combat in Northern Ireland and participation in a hunger strike. The Second Circuit described PTSD as a disorder which formerly had been referred to as "battle fatigue" or "shell shock." *See also, United States v. Duggan*, 743 F.2d 59 (2nd Cir. 1984).

3. Threshold Requirements

If the novel or innovative utilization of a DSM-IV disorder as the basis for an insanity defense, case law indicates that a defendant must meet certain threshold matters. In this regard, it is necessary that a defendant establish that the disorder with which he is afflicted is one which is recognized by authorities in the field. Further, he must establish that there is a recognized causal connection between the particular disorder with which he is afflicted and the criminal acts in which he engaged. For example, an individual who claims that he was insane because of the pathological gambler disorder must show that some people with that disorder lack the requisite capacity to conform their conduct to the law because of that disorder. *See, e.g., United States v. Lewellyn*, 723 F.2d 615, 617 (8th Cir. 1983); *Toner, supra*.

DSM-V is currently in field trials.

III. Pretrial Preparation and Investigation

A. Applicability of *Brady v. Maryland*

Of course, the prosecutor's responsibilities under *Brady v. Maryland*, 373 U.S. 83 (1963), apply with full force to information in the possession of the prosecutor tending to support a claim of insanity or incompetence. *Orr v. United States*, 386 F.2d 988, 993-94 (D.C. Cir. 1967).

B. Interview of Adverse Mental Health Expert

An attorney confronted with an adverse mental health expert in the context of an insanity defense may find it useful to explore certain specific areas during a pretrial interview of that expert.

These areas may include the following:

1. The precise diagnosis made by each mental health expert;

2. If the expert has diagnosed the defendant as having a mental disorder, the symptoms of the particular disorder diagnosed that appear in the defendant;

3. Any objective evidence of mental disorder the mental health expert may have noted, *Mims v. United States*, 375 F.2d 135, 143-44 (5th Cir. 1967);

4. Whether psychological testing was performed on the defendant, and, if so:

   a) by whom;

   b) the tests administered;

   c) the whereabouts of the raw grading material; and

   d) the conclusions drawn from each test and the respective importance thereof.

5. Any history of the defendant deemed significant by the mental health expert in reaching a diagnosis, including criminal history. *State v. Rodriguez*, 126 Ariz. 28, 31, 612 P.2d 484, 487 (1980); 2 Wigmore, *Evidence*, § 228 (3rd ed. 1940);

6. Any history of aberrant conduct or action, whether before or after the crime, of which the expert is aware. *United States v. Alden*, 476 F.2d 378, 383 (7th Cir. 1973); 2 Wigmore, *Evidence*, § 233 at 25 (3rd ed. 1940);

7. Any contributing effect one or more external stimuli, such as alcohol or drugs, may have had upon the behavior of the defendant. *United States v. Burnim*, 576 F.2d 236, 238 (9th Cir. 1978); *Kane v. United States*, 399 F.2d 730, 735-36 (9th Cir. 1968). But see, *United States v. Henderson*, 680 F.2d 659 (9th Cir. 1982). See also APAAC Prosecutor's Manual, Defenses, Section IX(D), Intoxication.

8. If a mental disorder has been diagnosed, the expert's opinion as to the etiology (cause or origin) of the disorder;

9. Whether the mental health expert ever treated or observed the defendant prior to the commission of the crime for which the defendant is to stand trial;

10. Whether the mental health expert has any information that the defendant has received treatment from <u>any</u> other mental health expert prior to the commission of the crime, including any prior diagnosis, prognosis, and the context thereof;

11. Whether the mental health expert has any information that the defendant has previously been found incompetent to stand trial. If so, a motion *in limine* may be appropriate, *United States v. Collins*, 491 F.2d 1050, 1053 (5th Cir. 1974);

12. Insofar as the opinion of the mental health expert regarding sanity is concerned, the expert should be questioned during the pretrial interview as to the expert's familiarity with the "facts" of the case, including the <u>source</u> of the expert's knowledge (e.g.,

opposing counsel, police reports, statements qf witnesses, statements of defendant). *See, e.g., Hughes v. United States*, 306 F.2d 287, 290 (D.C. Cir. 1962) (opinion by former Chief Justice Burger, "fragile evidentiary basis" for defense experts' opinions);

13. The expert may also be asked whether the defendant still "suffers" from the mental disorder that caused "insanity" at the time of the crime. If the defendant is no longer afflicted with the mental disorder, perhaps the defendant was "temporarily" insane. *See, e.g., State v. Karstetter*, 110 Ariz. 539, 541, 521 P.2d 626, 628 (1974).

14. The expert can be asked if he realizes that the terms psychosis and insanity are not synonymous. *State v. Fayle*, 134 ARiz. 565, 575, 658 P.2d 218, 228 (App. Div. 1 1982). *See also Dennis v. State*, 317 S.E. 874, 876 (Ga. App. 1984).

15. The mental health expert should also be asked during the pretrial interview whether he:

    a) has discussed his findings regarding the defendant with any other experts;

    b) has discussed any other experts' conclusions regarding the defendant with anyone else;

    c) has furnished his report or conclusions to anyone besides the defense attorney;

    d) has examined the report or conclusions of any other expert.

    Obviously, the purpose behind these questions is to determine whether a team of mental health experts is pooling information and reaching a joint conclusion;

16. Based upon everything considered, the opinion of each mental health expert as to whether the defendant was sane at the time of commission of the crime. When appropriate, inquiry of each expert as to his or her understanding of the legal definition of the term "insanity;"

17. Whether the defendant is likely to engage in future violent, dangerous behavior. See, *Barefoot v. Estelle*, 463 U.S. 880, 896-903 (1983); *Tarasoff v. Regents of University of California*, 551 P.2d 334, 344-45 (Cal. 1976).

18. The expected source and amount of payment for services rendered, when appropriate.

The above-mentioned general areas for questioning may serve to furnish counsel with invaluable ammunition for cross-examination at trial, particularly if obvious inconsistencies exist between the experts' opinions or if the experts' conclusions belie the jury's own observations and impressions. The above-mentioned general areas for questioning may also serve to warn counsel of damaging testimony that is likely to be developed at trial.

C. Investigation

Of course, preparation for a trial involving an insanity defense must go far beyond merely interviewing prospective expert witnesses. Painstaking examination must be made of each detail

surrounding the commission of the crime. These details may be ascertained from witnesses or, on occasion, only from physical evidence or circumstances. Additionally, witnesses having knowledge of the defendant's ability to function in society before and after the crime may also be important to the jury in evaluating the legitimacy of the defendant's claimed insanity. *See, e.g., State v. Steelman*, 120 Ariz. 301, 585 P.2d 1213 (1978).

Minor details which are ordinarily of no significance can constitute critical evidence regarding the issue of sanity. Thus, the exact demeanor of the defendant at the time of arrest and during the booking process, as well as conduct in jail, can be highly persuasive to a jury passing judgment on the issue of the defendant's sanity. *Caveat:* The defendant's post-*Miranda* request for an attorney at the time of interrogation may not be used as evidence of sanity against him. *Wainwright v. Greenfield*, 474 U.S. 284 (1986). The state must ask "carefully framed questions that avoid any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." *Id*. at 295.

D. Physician-Patient and Attorney-Client Privilege

Case law exists to support the notion that a defendant waives his doctor-patient privilege and cannot preclude a mental health expert retained by the defense to evaluate the defendant's sanity from being called by the prosecution if an insanity defense is presented. *United States v. ex rel. Edney*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1977); *Granviel v. Estelle*, 655 F.2d 671 (5th Cir. 1981); *Noggle v. Marshall*, 706 F.2d 1408, 1413-16 (6th Cir. 1983).

E. Future Dangerousness

Often, in insanity trials, testimony is elicited from mental health experts that the defendant is not a dangerous person and is unlikely to engage in illegal activities in the future. Such predictions are of dubious value. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 896-903 (1983); *United States v. Lyons*, 731 F.2d 243, 249 n.13 (5th Cir. 1984); *Smith v. Estelle*, 602 F.2d 694, 699-700, n.7 (5th Cir. 1979); *Tarasoff v. Regents of University of California*, 551 P.2d 334, 344-45 (Cal. 1976).

IV. Methods Used by Psychiatrists and Psychologists to Reach Opinions Regarding Sanity

A. Introduction

The trial attorney should avoid being unduly impressed with the opinions of mental health experts regarding sanity. Insanity is a legal term with no medical counterpart. *State v. Edwards*, 139 Ariz. 217, 220, 677 P.2d 1325, 1328 (App. Div. 1 1983); Baur, *Legal Responsibility and Mental Illness*, 57 Nw. U.L. Rev. 12 (1962-1963).

Psychiatric testimony is not conclusive on the issue of legal responsibility, which is solely within the province of the trier of fact to determine. See *People v. Wolff*, 394 P.2d 959, 969 (Cal. 1964)("[S]trictly speaking, a psychiatrist is not an 'expert' at all when it comes to determining whether the defendant is legally responsible...."). In 1978, Stephen J. Morse, professor of both law and psychiatry at the University of California wrote: "[W]hen experts testify on ultimate legal issues, they are offering unscientific value judgments that are no more reliable or entitled to weight than lay judgments." S. Morse, *Crazy Behavior*, *infra*, at 602-603. Former Chief Justice Burger, while serving as a judge on the United States Court of Appeals,

wrote that a psychiatrist's opinion regarding a defendant's sanity is a conclusion of law "for which the psychiatrist has no competence." *Blocker v. United States*, 288 F.2d 853, 863 (D.C. Cir. 1961, concurring opinion).

B. Psychiatric Examinations

Most psychiatrists reach conclusions regarding the sanity of a given individual based upon a psychiatric examination. The psychiatric interview includes the taking of a psychiatric history as well as a mental status examination. The psychiatric history may be of dubious value when the defendant is the primary historian. The mental status examination often consists of the drawing of conclusions by the psychiatrist based upon his observations and impressions. For a more detailed discussion of the psychiatric history and mental status examination, counsel may wish to refer to *Comprehensive Textbook of Psychiatry*, *infra*, Section IX. The Rosenhan study, involving the deception of mental health experts at various hospitals by pseudo-patients who asserted that they suffered from a few symptoms incapable of being verified, is relevant to any claim that mental health experts can't be deliberately deceived by their wards. See Rosenhan, "On Being Sane in Insane Places," Science, I. 179, 2973, pp. 250-58. See also, Ziskin, Jr. *Coping With Psychiatric and Psychological Testimony,* pp. 348-67 , *infra*, Section IX.

C. Psychological Tests

Psychologists generally have available to them a myriad of psychological tests. Tests are generally administered in a "battery" or series. The attorney confronted with a mental health expert who is primarily relying upon psychological tests as the basis for an opinion regarding the defendant's sanity may wish to review the available literature regarding key tests. *See, e.g., An MMPI Handbook, infra,* Section IX. Psychological tests commonly purport to measure intellectual, cognitive factors or non-intellectual factors, such as personality traits. The value of psychological tests is no greater than the training and skill of the person administering and interpreting the tests. Even disregarding the subjectivity involved in interpretation, one major obstacle to psychological testing as a valid and reliable basis for reaching a conclusion regarding an individual's sanity remains: *there is no psychological test designed to determine the criminal responsibility of a subject. See, e.g.*, Ziskin, J., *Coping with Psychiatric and Psychological Testimony, supra,* p.201.

V. Cross-Examination of Mental Health Experts

A. Areas of Cross-Examination

Even though an attorney may not have extensive knowledge of psychiatric concepts, certain areas may almost always be gone into with some effectiveness on cross-examination. These areas include potential bias of the expert witness, the very nature of psychiatry and psychology, and the FACTS.

B. Bias and Prejudice of the Mental Health Expert

1. The psychiatrist should routinely be questioned as to how he entered the case.

2. The psychiatrist should be questioned as to the number of times that he has testified, if the attorney knows that he has testified numerous times.

3. A psychiatrist should also be questioned as to the number of times or percentage of times that the doctor has testified for the opposition as compared to the overall number of times he has testified at trial, if the attorney knows that the psychiatrist has testified a disproportionate number of times on behalf of the opposition.

4. When appropriate, "philosophical bias" of the mental health expert may be explored.

C. The Weaknesses of Psychiatry and Psychology

1. The psychiatrist may be questioned as to whether he feels that psychiatry is an exact or precise science.

2. The psychiatrist may be asked what he bases his opinion upon besides his interview of the defendant. Even if psychological testing has been conducted by a psychologist, there is no recognized psychological test for determining an individual's legal sanity.

3. Insofar as the diagnosis of mental disorders are concerned, as has been previously mentioned, psychiatrists rely upon the DSM-IV. Inclusion of disorders in the DSM-IV is a product of membership vote. It is obvious from comparison of DSM-I, DSM-II, and DSM-III, sometimes the membership changes its collective mind.

D. Cross-Examination on the Facts of the Case on Trial

1. The psychiatrist should be asked whether he had ever seen the defendant before the date of this examination. It should then be pointed out that the psychiatrist in fact had never seen the defendant until "X" months after the commission of the crime. These facts can lend themselves to the argument that in fact the psychiatrist is speculating as to what the defendant's condition was at the time of the commission of the crime.

2. The psychiatrist should be asked whether his conclusion regarding sanity is based almost solely upon his interview of the defendant after the commission of the crime and his interpretation of that information.

3. Functional versus organic disorders: Demonstrable evidence usually exists for organic disorders. On the other hand, there is no definite demonstrable change in the brain or central nervous system in functional disorders. The insanity defense is, more often than not, based upon functional disorders.

4. Frequently, a mental health expert will base a psychiatric opinion on "temporary insanity". In *State v Karstetter*, 110 Ariz. 539, 540, 521 P.2d 626, 627 (1974), the Court wrote:

> Dr. Enos, a Phoenix psychologist, and Dr. Tuchler, a Phoenix psychiatrist, testified for the defendant. They admitted that the defendant was sane up until the moment he first struck the victim and immediately after he had finished raping her, but claimed that he was insane for only the few minutes it took to commit the crime. *As the prosecution put it, the defendant was sane for all of his 27 years except 15-20 minutes.* [Emphasis added.]

VI. Rebuttal: Expert Testimony Not Required on Issue of Insanity

The general rule is that it is unnecessary for the state to produce expert witnesses to rebut the testimony of mental health experts called by the defense on the issue of insanity so long as sufficient evidence of sanity is introduced. *State v. Sanchez*, 117 Ariz. 369, 573 P.2d 60, 64 (1977) (the "jury was free to believe or disbelieve the testimony of the experts and find the defendant sane"). *See also United States v. McGraw*, 515 F.2d 758, 760 (9th Cir. 1975) (expert testimony not required from government if government discredits "the defendant's expert testimony on cross-examination" or relies "upon evidence from which the jury may infer that the defendant's expert testimony depends upon an incorrect view of the facts"). *But see, State v. Overton*, 114 Ariz. 553, 555, 562 P.2d 726, 728 (1977)(state cannot establish sanity by lay witnesses with insufficient opportunity to observe the defendant).

The converse is also true: "there is no inference, as a matter of law, that a defendant's sanity is established because he failed to call experts to rebut the state's experts." *State v. Bay*, 150 Ariz. 112, 116, 722 P.2d 280, 284 (1986).

VII. Non-Expert Evidence and Testimony

In addition to cross-examination of adverse mental health experts and presentation of mental health experts, counsel may find non-expert evidence and testimony very useful.

A. Rebuttal Evidence

Once the defendant puts his sanity at issue, he opens the door to a wide range of testimony that might otherwise be inadmissible. The Arizona Supreme Court has held that

> [t]he first and fundamental rule, then, will be that any and all conduct of the person is admissible in evidence. There can be [no restriction]; for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or the other upon the issue.

State v. Hurles, 185 Ariz. 199, 205, 914 P.2d 1291, 1297 (1996), citing 2 Wigmore, *Evidence* § 228 (1979). Such evidence includes, but is not limited to, information about the defendant's ability to "function" in society before and after the crime, including on-the-job performance, ability to maintain oneself, and recreational activities. *See, e.g., United States v. Shackleford*, 494 F.2d 67 (9th Cir. 1974).

The state may present evidence that the defendant's condition involved alcoholism and drug abuse which had a bearing upon his mental condition. *State v. Skaggs*, 120 Ariz. 467, 471, 586 P.2d 1279, 1283 (1978). Additionally, the defendant's prior acts of violence are admissible to rebut an insanity defense. *Id*. *See also State v. Hinchey*, 165 Ariz. 432, 436, 799 P.2d 352, 356 (1990) ("Once a defendant raises insanity as a defense, evidence of prior bad acts falls out of the limitations of Rule 404. All prior relevant conduct in the defendant's life is admissible [subject to Rule 402] because such evidence may assist the trier of fact in determining criminal responsibility.").

B. Lay Witness Testimony

Lay witness testimony may constitute penetrating evidence, to which the jury may give far more credence than a parade of "experts." *See, e.g., State v. Sanchez*, 117 Ariz. 369, 373, 573 P.2d. 60, 64 (1977). In Arizona, lay witness testimony regarding a defendant's sanity is admissible if there "existed an intimacy between the witness and the defendant of such a character and duration that the witness's testimony is of probative value to establish that the defendant knew the nature and quality of his act and that he knew it was wrong." *State v. Overton*, 114 Ariz. 553, 555, 562 P.2d 726, 728 (1977).

The insanity defense may be raised by lay witness testimony even in the absence of supporting expert testimony. *State v. Bay*, 150 Ariz. 112, 116, 722 P.2d 280, 284 (1986). Moreover, the jury is free to base its verdict on lay testimony, even in the face of conflicting expert testimony. *Id*.

VIII. Role of Intoxicants or Drugs

As a general rule, the insanity defense is not available to a criminal defendant who would not otherwise meet the legal test for insanity but for the voluntary ingestion of alcohol or drugs. *United States v. Shuckahosse*, 609 F.2d 1351, 1355 (10th Cir. 1979); *United States v. Burnim*, 576 F.2d 236, 238 (9th Cir. 1978); *Kane v. United States*, 399 F.2d 730 (9th Cir. 1968), cert. denied, 393 U.S. 1057 (1969). The mental condition which produced the mental disability must have been brought about by circumstances beyond the defendant's control. *Kane v. United States*, 339 F.2d at 735. *But see, United States v. Henderson*, 680 F.2d 659 (9th Cir. 1982).

See also APAAC Prosecutor's Manual, Defenses, Section IX(D), Intoxication.

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